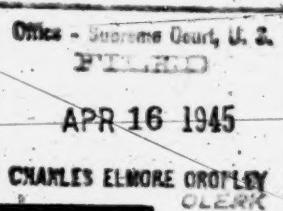


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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1944

No. 574.

THE STATE OF ALABAMA, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeal From the District Court of the United States for  
the Western District of Kentucky, Louisville Division.

**BRIEF ON BEHALF OF THE ALABAMA GREAT  
SOUTHERN RAILROAD COMPANY, ET AL., AP-  
PELLEES.**

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Appellees.*

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**OPINIONS BELOW.**

The opinion of the specially constituted three-judge District Court of the United States for the Western District of Kentucky, Louisville Division, entitled *State of Alabama v. United States*, Nos. 706-708, appears in the Record at page 1345; its findings of fact and conclusions of law

appear at pages 1341-1343; its decree thereupon entered at page 1362; and officially reported at 56 F. Supp. 478.<sup>1</sup>

The order of the Interstate Commerce Commission which gave rise to the suits in the District Court appears at pages 1-3 of the Record; the report of the Commission upon which said order was made appears in the Record at pages 4-39; and is officially reported at 258 I. C. C. 133, entitled Docket No. 28963, *Alabama Intrastate Fares*.<sup>2</sup> These two papers appear as Exhibits A and B to the Tennessee complaint, No. 707.

### JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 47(a) and 345, wherein a direct appeal to this Court is authorized from a final decree of a District Court of the United States, made pursuant to the provisions of Title 28, United States Code, Sections 41(28), 43-48, and Title 49, United States Code, Section 17(19) in a case brought to enjoin, set aside, annul, or suspend an order of the Interstate Commerce Commission, other than for the payment of money.

The rail lines (appellees here), upon whose petitions the Interstate Commerce Commission instituted the three proceedings giving rise to the order here immediately involved, duly intervened as parties defendant in the District Court in the three suits therein instituted by said states and their

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<sup>1</sup> The opinion below is entitled *State of Alabama v. United States*, but it embraces the suit of that State and its Public Service Commission, Docket No. 706, the suit of the State of Tennessee and its Railroad and Public Utilities Commission No. 707, and the suit of the Commonwealth of Kentucky and its Railroad Commission, No. 708, consolidated.

<sup>2</sup> The report and subsequent order of the Interstate Commerce Commission embraces four separate proceedings, three of them involving passenger fares within the States of Alabama, Tennessee, and Kentucky, and a fourth involving passenger fares within the State of North Carolina. While there were four separate proceedings, the I. C. C.'s decision was embraced in one report and order covering all four.

railroad regulatory commissions under authority of Title 28, U. S. C., Section 45a (R. 431, 542, 1136).

The final decree of the District Court was entered on the third day of August, 1944 (R. 1362). The petition for appeal was presented and allowed on the first day of September, 1944 (R. 1365, 1373). Probable jurisdiction was noted by this Court on the thirteenth day of November, 1944 (R. 1393).

### THE STATUTE INVOLVED.

The statute here involved is the Interstate Commerce Act, Part I, as amended; particularly its provisions relating to prescription of reasonable rates (Title 49, U. S. C., Section 15 (1)) for the transportation of persons in the light of what is known as the "rule of rate making" (Title 49, U. S. C., Section 15a (2), 54 Stat. 912), and the "national transportation policy" (Title 49, U. S. C., notes preceding Section 1, 54 Stat. 899); and more especially involved is the application of the Federal statute (Title 49, U. S. C., Section 13 (3) (4)) to remove any unreasonable preference or prejudice as between persons in intrastate and interstate commerce, or any unreasonable discrimination against interstate commerce. These sections of the Act are set out in Appendix No. 1 to this brief.

Section 13(4) immediately involved is here quoted:

"Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such

advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

#### **STATEMENT OF THE CASE.**

This appeal brings up for review the decree (R. 1362) of the statutory three-judge District Court wherein the order (R. 1-3, 4-39) of the I. C. C. was upheld.

The intrastate one-way civilian<sup>8</sup> coach fares within the States of Alabama, Kentucky, and Tennessee were published and maintained at the rate of 1.65 cents per mile and such round-trip fares within such states were on a somewhat lower level.

Rail fares good for round-trip transportation in sleeping cars and chair cars within the States of Alabama and Tennessee were on a lower level than the 3.3-cent-per-mile rate applicable to the one-way fares in sleeping and chair cars.

Certain railroads operating within each of these three states filed their appropriate tariffs with the railroad regulatory authorities therein whereby said roads sought to increase their one-way coach fares from 1.65 cents to 2.2 cents per mile and their round-trip coach fares to 1.98 cents per mile, also increasing the round-trip fares good for transportation in sleeping cars and chair cars to 2.75 cents per mile.

The Railroad Commission of Kentucky authorized the 2.75-cent rate for sleeping and chair car round-trip transportation. Otherwise the state authorities suspended said tariffs in each state and after hearing thereon denied the

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<sup>8</sup> Confined to "civilians" because the lower charges paid by United States Government for troop movements and the 1.25-cent fares maintained for service men and women traveling on furlough or within thirty days after their discharge from the service are not here involved.

increases sought. (R. 49-Tennessee, R. 855-Alabama, R. 1062-Kentucky.)

Thereupon, the rail lines, which had been denied the increases sought, filed their petitions with the I. C. C. under Section 13 (3) and (4) of the Interstate Commerce Act. Three separate petitions were filed. They were docketed *Alabama Intrastate Fares* No. 28963, *Kentucky Intrastate Fares* No. 29000, and *Tennessee Intrastate Fares* No. 29037.

Separate hearings were had in each of said proceedings, briefs were filed therein, and oral argument had before the I. C. C., the full bench sitting. Identical steps had been taken in respect of the intrastate civilian coach fares within the State of North Carolina. Upon refusal to sanction the increases to 2.2 cents one way and 1.98 cents round trip, a thirteenth-section petition was filed and docketed No. 29036. The North Carolina case was heard before the I. C. C. on oral argument along with the three proceedings here immediately involved.

Following said oral argument, one report was issued covering all four proceedings and entitled *Alabama Intrastate Fares*, dated March 25, 1944, and reported 258 I. C. C. 133-155 (R. 4-47).

A formal order was not entered at the time said report was issued, the I. C. C. saying that in accordance with its practice it left to the respective states the matter of adjusting the intrastate fares to conform to its findings and upon failure so to do consideration would be given to the entry of an appropriate order (p. 155, R. 39). Such readjustment not having been authorized by these states, the I. C. C. entered its order on May 8, 1944 (corrected), wherein it required the rail lines, which it had made respondents in the four-thirteenth-section proceedings, to increase their intrastate fares to the level of the interstate fares for such services, which the I. C. C. had prescribed for general application interstate throughout the United States and which had been sanctioned and put into effect in forty-four of the states for intrastate application (R. 1-3).

The state authorities of Alabama, Kentucky, and Tennessee filed their petitions (R. 1, 506, 1047) in the District Court of the United States for the Western District of Kentucky, Louisville Division, wherein they respectively sought to enjoin, set aside, annul, and suspend the order of the I. C. C., dated May 8, 1944 (R. 1-3). A three-judge District Court was convened, pursuant to the provisions of the statute, at Louisville, Ky., on the twentieth day of June, 1944 (R. 419). On call of the three cases, they were tried, argued, considered, and decided as a consolidated case, and upon findings of fact and conclusions of law, together with the Court's opinion, a decree was entered on the third day of August, 1944, denying the relief the complainants sought and dismissing their three complaints, thus upholding the order of the I. C. C. assailed by the three states and their regulatory commissions (R. 1362).

The three states having made their direct appeal to this Court, the same was docketed No. 574, October Term, 1944.

The thirteenth-section proceeding involving the North Carolina fares, heretofore referred to, resulted in a similar effort on the part of the North Carolina interests to enjoin and set aside the order of the I. C. C. A three-judge District Court having dismissed its complaint and upheld the order of the I. C. C. (56 F. Supp. 606), an appeal was taken which has been docketed in this Court as No. 560, October Term, 1944.

By appropriate order, it has been directed that the appeal in No. 574 be heard upon oral argument immediately following the oral argument in No. 560 (R. 1393).

## **ARGUMENT.**

### **The Ultimate Findings and Conclusions of the I. C. C. Are Grounded Upon Basic Findings of Fact Adequately Supported by Evidence.**

This Court has ordered oral argument of the appeal of the States of Alabama, Kentucky, and Tennessee, and their respective railroad regulatory commissions, be had immediately following the oral argument in Docket No. 560 which covers the appeal of the State of North Carolina, et al. (R. 1393). The report and order of the I. C. C. here involved is identical with the report and order involved in the North Carolina case, for the I. C. C. decided all four thirteenth-section proceedings in one report and issued one order thereon (R. 1-3, 4-39).

Rail lines, appellees in the North Carolina case, have filed their brief in the North Carolina case, Docket No. 560. By the time the oral argument in the appeal at bar is called the Court will have heard oral argument in the North Carolina case. The issues involved in the two appeals are identical, that is to say; whether or not the lower fares required by the several states for intrastate application create preference or prejudice as between passengers in intrastate commerce, on the one hand, and in interstate commerce, on the other hand, or cause discrimination against interstate commerce.

The findings made by the I. C. C. of unlawfulness in both particulars and that the same should be removed by increasing the intrastate fares to the level of the interstate fares, which it had prescribed and which it there found to be reasonable, were challenged by North Carolina upon the ground that the record made did not lead to the conclusions reached by the I. C. C. and that its findings were not supported by substantial evidence. Appellants in the case at bar seemed to take the same position. However, upon examining the points specified by the appellants in Docket No. 574 upon which they intend to rely, we find some con-

tentions put forward in a way that prompts us to specifically deal with them. We first take them up:

In the points to be argued filed on behalf of the States of Alabama and Kentucky, numbered II, III, IV, V, VI, and VII (R. 1381), appellants call attention to facts of record which they charge "do not constitute evidence" of unreasonableness, preference, prejudice, or discrimination, as the case may be. It is true the points just enumerated do not contain the more familiar expressions that particular facts received in evidence were irrelevant, immaterial, incompetent, and inadmissible, but the bald statement is made in each instance that such facts "do not constitute evidence." In point VIII the intention of appellants is made clear. There they state that the I. C. C. had "no authority to hear or consider evidence offered at said hearings by witnesses for the rail carriers on the issue of undue or unreasonable advantage, preference, or prejudice in favor of or against any locality or person not before it." So explained, there can be no doubt that what appellants are submitting in those points to this Court is the question of whether the evidence referred to in said points was properly received, which is to say that evidence should have been rejected.

However, upon reviewing the transcripts of the evidence received by the I. C. C. (R. 56-Tenn., 547-Ala., 1140-Ky.,) in the three thirteenth-section proceedings before it, no instance will be found where the state authorities or any one, for that matter, offered objection to the relevancy or materiality or admissibility of such evidence as respondent railroads, appellees here, introduced in such proceedings. In the Alabama case, Mr. Bruce, the Transportation Director for the Alabama Public Service Commission, did make objection to certain evidence as hearsay, which was overruled. *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 93. We therefore dispose of points II, III, IV, V, VI, VII, and VIII that appellants (Alabama and Kentucky) make here upon the ground that not having seasonably interposed their objections before the I. C. C. or in the lower court and

appropriately preserved the same, they may not raise such points at this time before this Court.

Points IX and X (R. 1385) to be argued by counsel for appellants, Alabama and Kentucky, seek apparently to raise the question, if we understand it correctly, that upon the I. C. C. finding a state rate lower than a reasonable rate which it had prescribed and which, if made effective intra-state, would produce increased revenue, it may not increase the intrastate fares should the railroads in the opinion of appellants have no need for increased revenue, and from that argue that no burden could be cast upon interstate commerce.

The answer to that proposition is extremely simple and has heretofore been made in our brief in the North Carolina case. It is this: The statute confides to the I. C. C. the authority and duty to determine this very question and, having determined it on substantial evidence submitted and in the light of appropriate procedural steps, no court may properly substitute its judgment in the premises for that announced by the I. C. C. Any other course would, quite obviously, defeat the purpose of the Federal statute and would tie the hands of the I. C. C. in performing the duty which the statute lays upon it. That is to say, to so regulate the matter of rates that the revenues therefrom shall be sufficient to maintain a national transportation system, adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense.

Stated somewhat differently, this point of appellants in Nos. IX and X comes to this: Unless the railroads of the country are in or upon the verge of bankruptcy, the I. C. C. may not function under the terms of Section 13, paragraphs 3 and 4. The authority and duty of the I. C. C. in the premises may not be throttled by any such narrow concept of the purpose of the Congress in enacting Section 13.

One might as well argue that the authority reposed in the I. C. C. to authorize abandonment of a line of railroad (49 U. S. C., Section 1, paragraphs 18-20) could never be

invoked and exercised unless the applicant railroad was in receivership or bankruptcy or so nearly so as to substantially amount to the same thing. The authority granted in respect of abandonments is to overcome an undue burden upon interstate commerce by reason of the continued operation of unprofitable rail lines. It is quite obvious that a railroad company may be highly prosperous and enjoy substantial income and yet have some one or more branch lines on which the traffic has completely dried up and disappeared. Surely it would be idle to argue that the I. C. C. could not authorize the abandonment of such a hopelessly unprofitable line merely because the operations of the applicant, as a whole, show an income, indeed, even a substantial income.

The question whether the present earnings of the railroads are or are not excessive is not one for determination by the courts. By the express terms of the Interstate Commerce Act (Section 15a (2)), the power and duty is imposed upon the I. C. C., in prescribing just and reasonable rates, to give due consideration to "the need of revenues sufficient to enable the carriers, under honest, economical and efficient management" to provide, in the public interest, "adequate and efficient railway transportation service." Upon consideration of the latest available reports of railroad earnings, the I. C. C. has found and declared in *Ex Parte 148* that present revenues, including the revenue derived from passenger fares, are needed for such purpose and "will meet the objectives of the national transportation policy as defined in the Interstate Commerce Act, and the standards of section 15a (2) thereof" (255 I. C. C., 393). It has reaffirmed this finding at as late a date as December 12, 1944, in the fifth report in *Ex Parte 148*. Such finding by the I. C. C., supported as it is by substantial evidence, is not reviewable by the courts.

That leaves us with one point, No. I. (R. 1381), put forward by the appellants Alabama and Kentucky and the single point put forward by appellant State of Tennessee

(R. 1386), which is to the effect that the findings of the I. C. C. are not supported by evidence.

Appellants are in error on this point. We have discussed it at length in our brief in the North Carolina case, Docket No. 560, and by the time the appeal at bar comes on for argument we feel sure the I. C. C.'s findings and their support by substantial evidence will have been made abundantly clear to this Court. Hence, we do not feel justified in prolonging this brief and burdening this Court with an unnecessary repetition of what has been said in our brief in the North Carolina case, except, perhaps, to point out some particulars illustrative, at least, of specific findings and their supporting evidence in the separate records made before the I. C. C. in the Alabama, Kentucky, and Tennessee proceedings. We do that here for convenience and also submit as Appendix 2 a more detailed showing in that respect.

**The interstate fares to which level the I. C. C. ordered the intrastate fares increased were duly found to be reasonable fares.**

That the interstate fares are reasonable was shown at such painstaking length in our brief in the North Carolina case, Docket No. 560, pages 21-33, and Appendix C that we feel justified in referring thereto without undertaking to here even briefly summarize the elaborate consideration the I. C. C. gave to that issue.

**The I. C. C.'s findings of preference and prejudice as between interstate and intrastate passengers are supported by evidence.**

In its report in *Alabama Intrastate Fares, supra*, the I. C. C. makes the following findings, among others:

"\*\*\* Respondents in each of these States are engaged in the handling of both intrastate and interstate passengers" (258 I. C. C. p. 145, R. 24).

"Such passengers are carried on the same trains and generally in the same cars, but the interstate passengers have to pay higher fares than the intrastate passengers for corresponding distances." (Typical examples of such differences are then given) (pp. 145-146, R. 24).

"So also, illustrations are of record showing differences between the fares over interstate and intrastate routes between points in the same State" (p. 146).

"All trains operated by respondents in each of the States are available to and are used by both interstate and intrastate passengers, and the services accorded to both classes of passengers are substantially the same" (p. 146, R. 24).

"The illustrations above given are typical of a condition which exists in some degree between interstate and intrastate passengers on every mile of track operated in passenger service by each of the respondents in all four of these States, excepting only those portions of respondents' lines on which the intrastate and the interstate bases are now the same" (p. 146, R. 25).

"Both intrastate and interstate passengers travel side by side under substantially similar circumstances and conditions on practically every passenger car on every branch and main line operated by respondents in each of these four States" (p. 153, R. 36).

"The evidence in each of these proceedings, therefore, contrary to the situation dealt with in *Wisconsin R. Comm. v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 580, establishes a condition which is State-wide, and is similar in every respect to that before us in *Rhode Island Commutation Fares*, 253 I. C. C. 383, and in *Increases in Texas Rates, Fares, and Charges, supra*." (p. 153, R. 36).

Each and all of these findings by the I. C. C. are supported by evidence of record. That interstate and intrastate passengers use the same trains and that all trains are available to interstate and intrastate passengers alike is shown by the testimony of railroad witnesses in each case—in the *Alabama case*, No. 28963, at R. 557, 611-612, 621, 631, 668, 690; in the *Tennessee case*, No. 29037, at R. 73; in the

*Kentucky case*, No. 29000, at R. 1149, 1190. Typical examples of the difference in fares paid by interstate and intrastate passengers appear in Exhibits 3 (R. 335, 336), 5 (R. 338), and 8 (R. 360) in No. 29037; Exhibit 4 (R. 1279) in No. 29000; and Exhibits 3 (R. 851), 5 (R. 856), 6 (R. 856), and 10 in No. 28963. Other exhibits display typical instances of the difference in fares via interstate versus intrastate routes—for example, Exhibit 7 (R. 857) in No. 28963 and Exhibit 3 (R. 335, 336) in No. 29037.

The I. C. C.'s finding that the conditions surrounding the interstate transportation of passengers, on the one hand, and the intrastate transportation in each of the four states, on the other hand, are substantially similar is likewise supported by evidence. As illustrative, testifying in the *Tennessee case*, No. 29037, Witness Jameson, whose experience in various positions in the operating departments of the N. C. & St. L. and L. & N. railroads covers a period of thirty-six years, testified;

"Q. Do the transportation conditions surrounding the handling of interstate passengers to, from or through Tennessee differ in any respect from those surrounding the handling of intrastate passengers within the State?

"A. They do not, no sir.

"Q. Do the transportation conditions surrounding the handling of passengers in the state of Tennessee differ in any material respect from those surrounding the handling of passengers in adjoining states, such as Alabama, Kentucky, Georgia; or generally in other parts of the South?

"A. No sir." (Docket No. 29037, R. 108).

To the same effect is the testimony in the *Alabama case*, No. 28963, of Witness Simpson (R. 690); and in the *Kentucky case*, No. 29000, the testimony of Witness Tolleson (R. 1190).

Appellants (Tennessee and Alabama) undertook to show at the hearings before the I. C. C. that under existing conditions coaches are frequently crowded and equipment

poor; that this situation particularly affects intrastate travel; that so-called "streamliner" trains make regular stops at the larger cities only and are not available to local intrastate travel; and that on various branch lines "mixed trains" only are operated. But upon this subject, the I. C. C. stated in its report (p. 148, R. 27):

"• • • But the suggestion that the service accorded to intrastate passengers generally in Alabama on interstate trains is inferior to that accorded to interstate passengers is not supported by the evidence of record."

And, as to certain "mixed trains" operated by one of the railroads on its branch lines in Tennessee, the I. C. C. stated (at p. 153, R. 35):

"Interstate as well as intrastate passengers may and do travel on the mixed trains described above, and the facilities and service furnished interstate passengers in such circumstances are the same as the facilities and service furnished intrastate passengers."

A representative of the Tennessee Commission had been instructed to travel on some of the "mixed trains" operated on branch lines of the N. C. & St. L. Ry. The witness found that on one of these trains which he rode there were two other passengers besides himself; on another three; on another "about 10"; and on another train "about 12" (No. 29037, R. 248). He was unable to say which of these other passengers were interstate passengers and which were intrastate, although the fact is that any person going by train from Chattanooga, for example, to a point located on any one of these branch lines would be an interstate passenger and would use these same trains. Two of these branch lines are themselves interstate branches, lying partly in Tennessee and partly in Alabama, but the witness had not been directed to inspect these particular branches. It was conceded that the revenue from passenger operations on all of these branch lines combined would amount to not more than \$500 per month. (No. 29037, R. 250-251, 289-291.)

As to the operation of the so-called "streamliners", which operate between Chicago and adjacent territory and points in Florida, it was shown that such trains are frequently stopped at the smaller points on special occasions. It was shown further that other daily through trains are regularly operated from Chicago to the South, which trains make regular stops at numbers of points in Tennessee as well as flag stops at various other points. (No. 29037, R. 117, 118; Exhibit 11, R. 373.)

As the I. C. C. finds, all of this evidence shows at best merely that—

"some of the trains operated in that State are superior to others, a situation which obviously is not peculiar to Tennessee alone." (258 I. C. C., p. 153, R. 35.)

It is difficult to see how evidence could more clearly show the preference to intrastate passengers and intrastate routes than those mentioned by the I. C. C. and the other illustrations in the record. Appellants, however, contend that the evidence is insufficient in that no passenger, or prospective passenger, complained of the differences in fares, and no actual damage to interstate passengers was shown specifically.

It seems to us that the damage to the interstate passengers and the interstate routes is obvious, and that it would have been a waste of time and effort to have had interstate passengers or prospective passengers at the hearings to testify to the obvious. The following language of the I. C. C. at page 389 of its report in *Rhode Island Commutation Fares*, 253 I. C. C. 383, is to the point:

"The foregoing illustrations are typical of others where, for the same or even shorter distances, interstate commuters now pay more than intrastate commuters traveling on the same kind of ticket subject to like restrictions. In other words, the interstate and intrastate commuters ride on the same train, yet for identically the same service the interstate passenger is required to pay a higher rate of fare than the intra-

state passenger. A little deductive reasoning is all that is required to spell out of those facts the undue prejudice and disadvantage and the undue preference and advantage forbidden by section 13(4) of the act.

"No one contends that the economic condition of the average intrastate commuter is any different from that of the interstate commuter. Plain justice demands, therefore, that the 10-per cent increase be paid by both or by neither. In view of our findings in *Ex Parte No. 148* in respect of the need for an increase in the interstate fares, and in the light of this record, it is clear that the only reasonable and lawful course to pursue is to require a like increase in these intrastate fares."

Similar findings were made in *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723. Both the *Rhode Island case* and the *Texas case*, like the instant proceedings, grew out of the denial by state authorities of the *Ex Parte 148* increases; and in both the I. C. C. ordered removal of the undue preference, prejudice, and discrimination thereby created.

We also cite in Appendix No. 3 hereto twenty or more cases in which the I. C. C. has found undue and unlawful prejudice and preference between interstate and intrastate passengers under Section 13 of the Act, upon evidence substantially similar to the evidence here. In practically none of these cases was there any testimony from passengers or prospective passengers purporting to show direct pecuniary loss or damage to them.

Here we have a case in which the intrastate fares in Alabama, Tennessee, and Kentucky are lower than the corresponding interstate fares in those states, as well as other Southern states, some of which are immediately adjacent to the three states named. The fact that this difference is material and without justification, that it affects a large number of interstate passengers, and that the prejudice to such passengers is obvious, makes out a case under Section 13(4) of the Act of preference and prejudice as between persons in intrastate and interstate commerce. It needs no

argument to show that to charge two passengers, who may be riding in the same train and, perhaps, in the same seat, different fares for the same service amounts to unjust discrimination.

It can not be doubted that the power of the I. C. C. under Section 13(4) is broader than it is under Section 3(1). It is to be noted that throughout Section 3(1) the word "particular" appears. It is made unlawful for any common carrier to make, give, or cause any undue or unreasonable preference or advantage to "any particular person, company, etc." In Section 13(4), on the other hand, the word "particular" does not appear. The prohibition there is against *any* undue or unreasonable advantage, preference, or prejudice "as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand."

The broader scope of Section 13(4) is also indicated by the fact that its purpose is to foster and protect interstate commerce and the national transportation system, whereas the purpose of Section 3(1) is to prevent undue preference and prejudice as between individual shippers or passengers. To hold that Section 3(1) and that portion of Section 13(4) which deals with preference and prejudice as between persons and localities mean precisely the same thing would be equivalent to saying that Congress had indulged in needless repetition and that the differences in the language used mean nothing.

**The evidence supports the I. C. C.'s findings of undue and unlawful discrimination against interstate commerce.**

At page 154 of its report, the I. C. C. makes the following finding:

"Respondents' revenues under the lower intrastate fares are less by at least \$725,000 per annum in Alabama, \$500,000 in Kentucky, \$525,000 in North Carolina, and \$525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding

interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service." (R. 38).

This finding of the I. C. C. is supported by evidence of record.

Increased intrastate fares in Alabama were published to become effective December 1, 1942. Exhibit 17 (R. 866), filed by Witness Tassin in Docket No. 28963, shows that because of the failure of the Alabama Commission to permit the fare of 2.2 cents per mile to become effective, for the four-month period ending March 31, 1943, the loss of revenue to the carriers operating in Alabama was \$250,166. On a yearly basis this loss would amount to \$750,498 (Docket No. 28963, R. 868, 708). Exhibit 6 (R. 1282); filed by the same witness in the Kentucky case, shows that the revenue that would have accrued to the railroads in Kentucky, had the passenger business moved within the state on the same fares as interstate, would have been increased, for the seven months ending June 30, 1943, by \$306,951—or at a yearly rate of \$526,200 (Docket No. 29000, R. 1200, 1284). Statement 1 of Exhibit 6 (R. 339), filed by the same witness in the Tennessee case, shows the actual revenue loss sustained by the Tennessee railroads, individually and collectively, by reason of the Tennessee Commission's refusal to authorize an increase of intrastate fares to the interstate level. For the twelve-month period from October 1, 1942, to September 30, 1943, the actual revenue loss was \$556,280. For the N. C. & St. L. the revenue loss for a twelve-month period was \$240,215, for the Southern Ry. \$183,925, and for the L. & N. R. R. \$115,718 (Docket No. 29037, R. 122, 341). The combined loss of revenue to the railroads in the three states, together with the State of North Carolina, was at an annual rate of approximately \$2,400,000. per annum (258 I. C. C. 146-147, R. 25).

At page 154 of its report, the I. C. C. says (R. 36):

"The revenue lost to respondents in each of these States by reason of the lower intrastate fares is substantial, and the transportation conditions under which the intrastate service is performed do not differ materially from those under which the interstate service is performed. Section 13(4) of the act empowers us to increase intrastate rates or fares so that the intra-state traffic may produce its fair share of the earnings required by the respondent carriers to enable them to provide adequate and efficient railway transportation service, both interstate and intrastate. *United States v. Louisiana*, *supra*, page 75; *Florida v. United States*, 292 U. S. 1; *Illinois Commerce Comm. v. United States*, 292 U. S. 474. 'The effect of maintaining a lower rate, intrastate, than the reasonable interstate rate is necessarily discriminatory wherever the two classes traffic, inextricably intermingled, are carried . . . under substantially the same conditions.' *Illinois Commerce Comm. v. United States*, *supra*, page 485."

It is further stated in the report, at page 147 (R. 25, 26):

"The intrastate fares in each of the States may be used to defeat or break down the interstate fares, and thereby reduce the revenues on interstate traffic. Thus, passengers destined to points outside the respective States may now purchase intrastate tickets to points on or near the State line and either rebuy tickets or pay cash for the remainder of the journey."

In *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 585-586, the Supreme Court stated:

"\* \* \* Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent. of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn

a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. *The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system.*" (Emphasis supplied.)

In *Florida v. United States*, 282 U. S. 194, the Court said (at p. 211):

"As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the act requires that intrastate traffic *should pay a fair proportionate share of the cost of maintenance*. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates, as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it." (Emphasis supplied.)

Again, in *United States v. Louisiana*, 290 U. S. 70, 75, the Supreme Court stated:

" \* \* \* So construed, section 13(4) confers on the Commission the power to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate."

The record here shows, and the I. C. C. finds, that the intrastate traffic in the three states of Alabama, Tennessee, and Kentucky was failing to contribute its fair proportionate share of the revenue needed for the maintenance of an adequate transportation system—in Alabama at the rate of \$725,000 per annum; in Kentucky at the rate of over \$500,000; and in Tennessee at the rate of over \$525,000 per annum.

## CONCLUSION.

The District Court, upon concluding that there was a clear case of discrimination against interstate commerce, saw no reason to concern itself with the finding that the I. C. C. had made in respect of preference of intrastate travelers as contrasted with prejudice against interstate travelers. That is as we read the opinion which the Court filed (56 F. Supp., at 487, R. 1346, 1358).

However, it will be noted that the Court in its finding numbered 4 (R. 1342, 1343) specifically recited that the I. C. C. had found that the interstate rates were reasonable, that the intrastate rates in these states were lower, that the conditions affecting transportation under both sets of rates were substantially similar, that both classes of passengers travel in the same trains and generally in the same cars, but that the interstate passengers paid a higher fare than the intrastate passenger. Then followed the finding with respect to the discrimination against interstate commerce, and that was followed by finding numbered 6 (R. 1343) in which the District Court found as facts: "said findings of the I. C. C. . . are supported by substantial evidence." That being so, we feel justified in saying here that while the District Court in the appeal at bar may have cut its opinion short in this particular, nevertheless its findings support the I. C. C. in that the I. C. C.'s findings were made and supported by substantial evidence. Undoubtedly the appeal of Alabama and Kentucky takes this view of the record of the Court below, though it may be the appeal of the State of Tennessee differs for it would seem to confine its contention to the lack of evidence supporting the finding of discrimination against interstate commerce.

Be that as it may, both phases of the case have been fully covered in our argument here filed in the North Carolina case, Docket No. 560.

Directing attention, however, only to the sole question of discrimination against interstate commerce, it is enough to say that the finding on that point, supported as it is by

substantial evidence, supports the District Court's decree and requires its affirmance here. The District Court stressed this (R. 1359). Over half a million dollars a year in each of two of the states and nearly three-quarters of a million dollars in the third produces the substantial total of almost \$2,000,000 per annum, merely to state the loss conservatively in round figures.

It is indeed a rare situation when the regulatory authorities of the three states, Alabama, Kentucky, and Tennessee, reject the efforts of certain railroads operating within their states, appellees here, to effect certain increases in their passenger fares in order to harmonize them with the prevailing interstate level and that generally applicable in all other states, and yet, at the same time, these four states do not deny to certain other railroads operating within their borders passenger fares on the level appellee roads sought authority from such states to maintain. Such roads as the Illinois Central, Gulf, Mobile & Ohio, and St. Louis-San Francisco operate in Alabama, and the first two operate in Alabama, Kentucky, and Tennessee and the Chesapeake & Ohio in Kentucky. Those railroads have all along had in effect on their lines intra-state in those states passenger fares on the very level to which the appellee railroads here sought authority from those states to increase their passenger fares. In some instances they were reduced to meet competition of the lower fares these states required of certain other railroads. There is no suggestion of justification of this difference in treatment in respect of the interested railroads, or from the standpoint of the traveling public using the services of both sets of railroads—those which had the higher fares or those which were refused permission to increase their fares to a like level.

We submit that in the *Alabama case*, Docket 28963, the *Tennessee case*, Docket 29037, and in the *Kentucky case*, Docket 29000, (258 I. C. C. 133) the Interstate Commerce Commission made the essential basic findings to support

the ultimate conclusions it reached and upon which the order herein attacked was entered. Those findings and the ultimate conclusions and the order entered thereon are supported in the record by substantial evidence. All proper and appropriate procedural steps were taken, including notice, hearing, receipt of material evidence, briefs, and oral argument on behalf of the interested parties, consideration of the record so made and the report and order issued in due season, all in keeping with the provisions of the applicable statutes. The District Court correctly so held and committed no error in refusing the injunction and dismissing the suits filed by the States of Alabama, Tennessee, and Kentucky and their respective railroad regulatory commissions. The decree of the District Court should be affirmed.

Respectfully submitted,

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Appellees.*

**CERTIFICATE OF SERVICE.**

I certify that I am of Counsel for the railroads who are appellees in Nos. 560, 561, 574, and 592, and have this day served the foregoing brief, and the appendices thereto, by depositing copies of the same in the United States mail, properly stamped with first-class postage and properly addressed to the following:

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and 592.

This            day of April, 1945.

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CHARLES CLARK.

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Washington, D. C.

**APPENDIX NO. 1.****CERTAIN SECTIONS OF THE INTERSTATE  
COMMERCE ACT, PART I.****U. S. Code, Title 49, Section 13(3):**

Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearing with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

**U. S. Code, Title 49, Section 13(4):**

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the

one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

U. S. Code, Title 49, Section 15(1) :

That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classifica-

tion, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

**U. S. Code, Title 49, Section 15a(2) :**

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

**U. S. Code, Title 49, notes preceding Section 1:**

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to

cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

**APPENDIX NO. 2.**

FINDINGS OF THE INTERSTATE COMMERCE COMMISSION AND EVIDENCE FROM THE RECORD IN THE ALABAMA CASE DOCKET 28963, THE KENTUCKY CASE DOCKET 29000, AND THE TENNESSEE CASE DOCKET 29037 SUPPORTING SUCH FINDINGS.

FINDINGS, 258 I.C.C., 146, R. 25:

*All trains are available to and are used by both interstate and intrastate passengers and services accorded both classes of passengers are substantially the same.*

SUPPORTING EVIDENCE—ALABAMA:

Passenger trains in Alabama carry both interstate and intrastate passengers; both interstate and intrastate passengers frequently ride on the same trains and in the same coaches (Aiken, R. 557, 611, 612).

Intrastate passengers in Alabama have opportunity to use streamline trains and other through trains which have air conditioned equipment; and they get exactly the same service as the interstate passengers (Aiken, R. 611, 612).

Interstate and intrastate passengers ride on all of the trains that the Central of Georgia operates between points in Alabama (Stewart, R. 621).

No reason why the coach fares in Alabama should be less than the coach fares between points in Alabama and points in adjoining states (Stewart, R. 621).

On trains operated by the Seaboard the interstate and intrastate passengers are furnished the same services and conveniences (Makinson, R. 631).

A. C. L. train operating in Alabama handles both interstate and intrastate passengers (Lynch, R. 645).

Intrastate passengers in Alabama have the same facilities as interstate passengers (Geil, R. 668).

There is no difference between the service which passengers traveling in interstate commerce receive than that which is given intrastate passengers in Alabama (Simpson, R. 686).

The trains operated by Southern Railway System in Alabama handle both interstate and intrastate passengers (Simpson, R. 690).

The operating conditions in Alabama are similar to those in the other states in which Southern Railway System lines and other railroads operate (Simpson, R. 690).

Intrastate passenger in Alabama has same opportunity to board "streamliners" as an interstate passenger (Johnson, R. 808, 809).

The "South Wind," a streamliner, operates from Chicago to Miami, and is handled over the Coast Line in Alabama. Seats are available to intrastate passengers as well as interstate passengers. The intrastate passenger pays 1.65 cents per mile, whereas the interstate passenger pays 2.2 cents per mile. (Lynch, R. 647-649.)

#### SUPPORTING EVIDENCE—KENTUCKY.

Passenger trains in Kentucky carry both interstate and intrastate passengers who frequently ride on same trains and in same coaches (Aiken, R. 1149).

It is possible for both interstate and intrastate passengers to ride on mixed trains operated by Illinois Central in Kentucky (Tucker, R. 1183).

All passenger trains operated by Southern Railway System lines in Kentucky handle both interstate and intrastate passengers. There is no difference in the service afforded by the Southern Railway System lines to interstate and intrastate passengers. This is likewise true as to all of the railroads operating in the State of Kentucky. (Tolleson, R. 1190.)

Operating conditions in Kentucky are similar to those in other states in the South (Tolleson, R. 1190).

#### SUPPORTING EVIDENCE—TENNESSEE.

There are no differences in the surrounding circumstances pertaining to interstate and intrastate transportation (Gaffney, R. 73, 74).

The railroads operating in Tennessee have spent large sums of money in the purchase of new equipment and, in the modernization of coaches. All of these are available to Tennessee intrastate passengers as well as interstate passengers, and the interstate passenger pays on basis of 2.2 cents per mile; whereas the intrastate passenger pays but 1.65 cents. (Gaffney, R. 87.)

Interstate and intrastate passengers in Tennessee are handled in the same trains and receive the same service (Jameson, R. 73).

The transportation conditions surrounding the handling of passengers in the State of Tennessee do not differ in any material respect from those surrounding the handling of passengers in adjoining states, such as Alabama, Kentucky, and Georgia, or generally in other parts of the South. However, on the N. C. & St. L., certain operating difficulties are encountered on account of the mountain country. (Jameson, R. 107, 108; Gaffney, R. 73, 74.)

The streamliner winter trains, which operate on alternate days and via different routes from Chicago and points in that territory to Florida, make regular stops at the larger cities alone when passing through Tennessee.

These trains are frequently stopped at smaller cities on special occasions; and the same thing is true of such daily through trains from Chicago as the "Dixie Flyer" and "Dixie Limited" which also make stops at points between Nashville and Chattanooga, such as Tullahoma and Decherd, as well as flag stops at various other points (Jameson, R. 116-118; Exhibit 11, R. 372).

**FINDINGS, 258 I. C. C., 145-146, (R. 24):**

*Interstate and intrastate passengers are carried on the same trains and generally in the same cars, and interstate passengers have to pay higher fares than intrastate ones for corresponding distances.*

*Columbus, Miss. to Anniston, Ala. 186 miles—fare \$4.11  
Sheffield, Ala. to Anniston, Ala. 193 miles—fare 3.30*

*Difference (Exhibit No. 3, R. 851) ..... \$ .81*

*Lexington, Ky. to Columbus, Ohio, 197 miles—fare \$4.44  
Lexington, Ky. to Owensboro, Ky. 199 miles—fare 3.35*

*Difference (Exhibit No. 4, R. 1280) ..... \$1.09.*

*Chattanooga, Tenn. to Asheville, N. C. 240 miles  
—fare \$5.32*

*Chattanooga, Tenn. to Bristol, Tenn. 242 miles—fare 4.05*

*Difference (Exhibit No. 3, R. 335) ..... \$1.27*

**SUPPORTING EVIDENCE—ALABAMA:**

Exhibit 10, shows the manner in which the lower basis of fares intrastate in Alabama results in discrimination against interstate passengers. It shows that from Thomasville, Ga., to Ozark, Ala., the interstate passenger,

for a distance of 118.8 miles, pays \$2.64. From Dothan, Ala., to Montgomery, Ala., a distance of 119 miles, the intrastate passenger pays \$2.00. The interstate passenger travels two-tenths of a mile less than the intrastate passenger and yet pays 64 cents more. Both the interstate and the intrastate passenger have the same trains available, and the same equipment available. (Lynch, R. 644; Exhibit 10, R. 860.)

From Montgomery, Ala., to Atlanta, Ga., for a distance of 175 miles, the interstate passenger pays \$3.85, and from Montgomery, Ala., to Mobile, Ala., for a distance of 178 miles, the intrastate passenger pays \$2.95, or 90 cents less for a greater distance of 3 miles.

From Montgomery, Ala., to Atlanta, Ga., for a distance of 175 miles, the interstate passenger pays \$3.85, whereas an intrastate passenger traveling from Montgomery, Ala., to Decatur, Ala., a distance of 183 miles, pays \$3.05, or 80 cents less than the interstate passenger (Higgins, R. 659; Exhibit 11, R. 860).

There is no reason why the intrastate fares in Alabama should be less than the interstate coach fare from a point in Alabama to a point in an adjoining state. (Higgins, R. 660).

#### SUPPORTING EVIDENCE—KENTUCKY.

The fares paid by passengers traveling within the State of Kentucky are lower than those paid by interstate passengers traveling from a point within Kentucky to a point outside of that state for substantially similar distances. The following are examples: The interstate fare on basis of 2.2 cents per mile from Lexington, Ky., to Columbus, Ohio, a distance of 197 miles, is \$4.44, whereas the intrastate fare on basis of 1.65 cents per mile from Lexington, Ky., to Owensboro, Ky., a distance of 199 miles, or 2 miles greater is but \$3.35, a difference of \$1.09; from Lexington, Ky., to

Lima, Ohio, for a distance of 209 miles, the interstate fare is \$4.66 whereas from Lexington, Ky., to Lynch Ky., a distance of 208 miles, the intrastate fare is \$3.50, or \$1.16 less; from Owensboro, Ky., to St. Louis, Mo., a distance of 207 miles, the interstate fare is \$4.91, whereas from Owensboro, Ky., to Winchester, Ky., a distance of 217 miles, the intrastate fare is \$3.70 or \$1.21 less; from Bowling Green, Ky., to Chattanooga, Tenn., for a distance of 225 miles, the interstate fare is \$4.99, whereas from Bowling Green, Ky., to Covington, Ky.; for the same distance, the intrastate fare is \$5.75, or \$1.24 less. (Aiken, R. 1154; Exhibit 4, R. 1280.)

From Fulton, Ky., to Grenada, Miss., a distance of 221.6 miles, the interstate passenger pays \$8.95, whereas from Fulton, Ky., to Cecilia, Ky., a distance of 223.4 miles, the intrastate passenger pays \$7.43 or \$1.52 less (Tucker, R. 1173, Exhibit 5, R. 1281).

#### SUPPORTING EVIDENCE—TENNESSEE.

Passenger trains operated in the State of Tennessee carry both interstate and intrastate passengers who frequently ride in the same trains and in the same coaches. There is no reason which would justify the maintenance of a fare of only 1.65 cents per mile for intrastate coach transportation within the State of Tennessee when an interstate passenger traveling to or from points within the state is required to pay 2.2 cents per mile. (Gaffney, R. 73, 74; 98, 99.)

Examples of fares paid by intrastate passengers contrasted with those paid by interstate passengers for approximately the same distances, which illustrate the discrimination against interstate passengers, are shown in Exhibits 3 and 8 (R. 335, 360). Following are a few taken from Exhibit 3, R. 335, 336:

From	To	Dis-tance	Fare One Way		Interstate Intrastate
			Per Mile	Coach Fare	
Nashville, Tenn.	Stevenson, Ala.	113.1	2.2	2.60	Interstate
Nashville, Tenn.	McKenzie, Tenn.	117.1	1.65	2.00	Intrastate
	Difference			.60	
Chattanooga, Tenn.	Asheville, N. C.	240.3	2.2	5.32	Interstate
Chattanooga, Tenn.	Bristol, Tenn.	241.9	1.65	4.05	Intrastate
	Difference			1.27	
Harriman, Tenn.	Alexander, N. C.	168.9	2.2	3.78	Interstate
Harriman, Tenn.	Nashville, Tenn.	165.6	1.65	2.75	Intrastate
	Difference			1.03	
Memphis, Tenn.	Knoxville, Tenn.	426.1	2.2a	9.39	Interstate
Memphis, Tenn.	Knoxville, Tenn.	455.9	1.65b	7.10	Intrastate
	Difference			2.29	
Nashville, Tenn.	Barnesville, Ga.	348.9	2.2	7.73	Interstate
Nashville, Tenn.	Bristol, Tenn.	347.8	1.65	6.65	Intrastate
	Difference			1.08	

a—Via Sou. Ry. direct.

b—Via N. C. & St. L.; Nashville-T.C.-Harriman-Sou. Ry.

Passengers travel from time to time between the origins and destinations listed on Exhibit 8. People are traveling generally in Southern territory. (Aiken, R. 201-203; Exhibit 8, R. 360.)

There is a discrimination against interstate passengers when they have to pay a higher fare than the intrastate passenger when they ride in the same train and for the same mileage (Gaffney, R. 186, 187; Aiken, R. 223).

Business concerns with traveling men who pay the intrastate fare and which compete the business firms with traveling men who pay the interstate fare have an advantage (Aiken, R. 223, 224).

The intrastate passenger traveling over the branch lines in Tennessee gets exactly the same service as the interstate passenger (Coke, R. 251).

**FINDINGS, 258 I. C. C., R. 24, 25:**

*Differences between fares over interstate and intrastate routes between points in state:*

*Piedmont, Ala. and Hurtsboro, Ala.*

<i>Interstate route—235.9 miles fare</i>	<i>\$5.21</i>
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<i>Intrastate route—236.9 miles—fare</i>	<i>4.05</i>
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<i>Difference (Exhibit 8, R. 858)</i>	<i><u>\$1.16</u></i>
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*Memphis, Tenn. and Knoxville, Tenn*

<i>Interstate route—</i>	<i>fare \$9.39</i>
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<i>Intrastate route (longer)</i>	<i>7.10</i>
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<i>Difference (Exhibit 3, R. 336)</i>	<i><u>\$2.29</u></i>
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**SUPPORTING EVIDENCE—ALABAMA:**

The coach fares between two points in Alabama, one over an intrastate route and one over an interstate route, are different. Between Piedmont, Ala., and Hurtsboro, Ala., via the interstate route through Atlanta, Ga., the passenger now pays \$5.21. Over the intrastate route through Birmingham he pays \$4.05, a difference of \$1.16, and there is only one mile difference in distance. (Makinson, R. 631; Exhibit 8, R. 858.)

From Opelika, Ala., to Troy, Ala., a passenger who travels via the Central of Georgia Railway would naturally have to go interstate via that line, a distance of 113.2 miles, with a coach fare of \$2.53. An intrastate passenger traveling between those points, a distance of 117.4, or for a greater distance of 4.2 miles over the interstate route, pays a coach fare of \$1.95, or 58 cents less than the fare via the interstate route.

From Birmingham, Ala., to Hurtsboro, Ala., via the interstate route the fare is \$4.11, whereas via the intrastate route the fare is \$2.65, or a difference of \$1.46.

From Birmingham, Ala., to Seale, Ala., via the interstate route the fare is \$3.78, and via the intrastate route it is \$2.90, or 88 cents less (Stewart, R. 618; Exhibit 6, R. 856).

#### SUPPORTING EVIDENCE—TENNESSEE:

Example 7 in Exhibit 3 shows the opportunity for a passenger to obtain a lower fare by using an intrastate route than if he used the interstate route. From Jackson, Tenn., to Knoxville, Tenn., the fare via the intrastate route is \$6.95 and via the interstate route it is \$8.18, or a difference of \$1.23. (R. 335.)

Example 8 in Exhibit 3 covers a movement from Memphis, Tenn., to Knoxville, Tenn. A passenger could apply at the ticket office of the N. C. & St. L. Ry. in Memphis for a ticket from Memphis to Knoxville and ride the N. C. & St. L. to Nashville, transfer to the Tennessee Central and ride to Harriman and thence Southern Railway to destination. That ticket would be sold to him at the rate of \$7.10, whereas if he was going direct over the Southern Railway, which is the short line from Memphis to Knoxville, or coming via the N. C. & St. L. via Nashville to Chattanooga, thence Southern Railway, it would cost him \$9.39, a difference of \$2.29. (R. 336.)

Passengers actually use the intrastate routes (Gaffney, R. 79).

#### FINDING, 258 I. C. C., 147 (R. 25, 26):

*Interstate fares may be used to defeat and break down the interstate fares, and thereby reduce the revenues on interstate traffic.*

*Passengers destined to points outside of the respective states may now purchase intrastate tickets to points on or near the state line and either rebuy tickets or pay cash for the remainder of the journey.*

*Respondents are convinced that this practice is common; its elimination would have an important effect upon additional revenues which they would receive if the intrastate fares were on the same level as the interstate fares.*

#### SUPPORTING EVIDENCE—ALABAMA:

With present difference between intrastate and interstate fares it is possible for a passenger to defeat interstate fares to and from points in Alabama by buying intrastate ticket to the point nearest the state line at which trains are regularly scheduled to stop and rebuying therefrom to interstate destinations (Aiken, R. 560, 597; Exhibit 2, R. 848).

It is common knowledge advantage has been taken by interstate passengers buying tickets at the lower intrastate fare to some points and rebuying from such points, or paying cash fares on trains to destinations. The condition which permits this does exist but it is difficult to police. (Aiken, R. 561, 594, 595.)

Our agents in Cincinnati, Ohio, have asked if they could issue a ticket to Jacksonville, Fla., at the interstate fare, so that the passenger could use the through service, and if he could issue another ticket going to Miami at the coach fare, and we have told them definitely and positively it could not be done. The same thing is true in Atlanta and other points on Southern Railway System. What actually happens is this: A passenger in Cincinnati wants to go to Miami, Fla., and has has a trunk he desires to ship through. If he bought a split ticket from Cincinnati to Jacksonville and a ticket from Jacksonville to Miami, he could check his baggage through and defeat the interstate rate from Cincinnati to Miami. (Aiken, R. 561, 562.)

Exhibit 3 (R. 851) was filed by Witness Aiken to illustrate the present lower coach fares in Alabama result in dis-

crimination against interstate commerce. From Tuscaloosa, Ala., to Laurel, Miss., a distance of 154 miles, the fare is \$3.44, whereas the intrastate fare from Tuscaloosa, Ala., to Valley Head, Ala., a distance of 159 miles or four miles greater, is but \$2.65, a difference of 79 cents (R. 563, 564).

From Birmingham, Ala., to Cordele, Ga., a distance of 268 miles, the interstate fare is \$5.90, whereas from Birmingham, Ala., to Mobile, Ala., a distance of 266 miles, the fare is \$4.45, or a difference of \$1.45 in favor of the intra-state passenger.

From Anniston, Ala., to Griffin, Ga., a distance of 146 miles, the fare is \$3.23, while from Anniston, Ala., to Akron, Ala., a distance of 147 miles, the intrastate fare is \$2.50, or a difference of 73 cents in favor of the intrastate passenger (Aiken, R. 563, 564; Exhibit 3, R. 851).

Due to lower intrastate fares in Alabama, passengers actually defeat the through published interstate fares by buying at the intrastate rate tickets for the portion of their journey between points in Alabama (Stewart, R. 628).

A passenger can buy a ticket from Birmingham, Ala., to Phenix City, Ala., for \$2.50 and pay the conductor a fare of 11 cents from Phenix City into Columbus, Ga., total, \$2.61. The interstate fare from Birmingham, Ala., to Columbus, Ga., is \$3.34. It will thus be seen that the passenger saves 73 cents. (Stewart, R. 617; Exhibit 5, R. 856.)

Interstate coach passengers traveling to and from points in Alabama have been defeating the through interstate fares by purchasing tickets at a fare of 1.65 cents per mile for a portion of their journey through Alabama. My own observation of refund claims and baggage claims clearly indicates it is being done. (Makinson, R. 629, 630, 639; Exhibit 8, R. 858.)

Sheet 3 of Exhibit 8 shows how two passengers leaving Birmingham, Ala., in the same train, occupying seats, maybe beside each other, will pay different rates per mile for that portion of the trip within the State of Alabama. The interstate passenger from Birmingham to Cedartown, Ga., pays an interstate fare of \$2.35.

A passenger on the same train from Birmingham to Borden Springs, Ala., pays \$1.55. The interstate passenger pays \$2.02 for that portion of his journey between Birmingham and Borden Springs, while the interstate passenger pays \$1.55 for the same distance, a difference of 47 cents in favor of the intrastate passenger. (Makinson, R. 631; Exhibit 8, R. 859.)

Exhibit 9 shows how the lower basis of fares intrastate in Alabama makes it possible for passengers to defeat the through published interstate fares. It shows that a passenger from Bainbridge, Ga., to Birmingham, Ala., moving via the A. C. L. to Montgomery, Ala., and the L. & N. beyond, pays the one-way interstate coach fare of \$6.02. By purchasing a ticket from Bainbridge to Dothan and there rebuying an intrastate ticket to Birmingham, he travels for \$4.90, thus saving \$1.12. (R. 859.)

On a journey from Thomasville, Ga., to New Orleans, La., via the A. C. L. to Montgomery, Ala., and the L. & N. beyond, the interstate one-way coach fare is \$11.55. If a passenger should buy a ticket from Thomasville to Montgomery and there rebuy a ticket from Montgomery to Mobile, and there rebuy a ticket to New Orleans, he can make the trip for \$10.69, thus saving 86 cents. (Lynch, R. 641; Exhibit 9, R. 859.)

Exhibits 12, 13, and 14 show numerous illustrations of the manner in which the through interstate fares can be defeated by a passenger purchasing tickets at the rate of 1.65 cents per mile for the portion of the journey in the State of Alabama. Personal observation is that passengers

are alive to the fact that the interstate fares can be cut by buying and rebuying. (Higgins, R. 659, 665; 185-186; Exhibits 12, 13, 14, R. 861-863.)

Passengers have indulged in the practice of rebuying tickets within Alabama—round-trip tickets within Alabama—in order to defeat a through round trip from a point outside of Alabama to a point in Alabama (Géll, R. 672, 673, 676; Exhibits 12, 13, 14).

#### SUPPORTING EVIDENCE—KENTUCKY:

With the present differences between interstate and intrastate fares it is possible for a passenger to defeat the interstate fares to and from points in Kentucky by buying an intrastate ticket for part of a trip. For instance, the published interstate one-way coach fare from Somerset, Ky., to St. Louis, Mo., (on basis of 2.2 cents per mile) is \$9.28. It is possible to purchase a one-way coach ticket from Somerset, Ky., to Louisville, Ky., at the intrastate rate of \$2.35 (made on basis of 1.65 cents per mile) and rebuy or pay cash fare on the trains from Louisville, Ky., to St. Louis, Mo., at interstate fare of \$6.27 (2.2 cents per mile) or a total expenditure of \$8.62, thereby defeating the through published interstate rate by 66 cents. (Aiken, R. 1149, 1150.)

Exhibit 3 contains 28 additional examples (R. 1276).

It is common knowledge that advantage has been taken of the disparity in fares by interstate passengers buying tickets at the lower intrastate fare to a given point and rebuying from such point, or paying cash fare on trains, to destinations (Aiken, R. 1151).

Possible reductions in interstate fares by purchasing to the point near the state line and rebuying therefrom to destination beyond are shown on Exhibit 5.

The round-trip coach fare from Paducah, Ky., to Cincinnati, Ohio, is \$13.80. A passenger could purchase at Paducah a round-trip coach ticket to Louisville, Ky., for \$7.48 and at Louisville he could purchase a round-trip coach ticket from Louisville to Cincinnati for \$4.80, making his total outlay \$12.28. The possible saving is \$1.52. (Tucker, R. 1172; Exhibit 5, R. 1280.)

Knows of passengers riding into Cincinnati when they should have gotten off at Ludlow, Ky.; the passengers pay the intrastate fare to Ludlow, Ky., instead of the interstate fare of 2.2 cents per mile to Cincinnati from wherever he starts his journey. Conductors have collected from passengers the difference in interstate and intrastate fare. (Tolleson, R. 1191, 1192.)

#### SUPPORTING EVIDENCE—TENNESSEE:

With the present differences between interstate and intrastate fares, it is possible for a passenger to defeat interstate fares to and from points in Tennessee by buying an intrastate ticket for part of the trip.

Examples of possible reductions of interstate fares by purchasing to the point nearest the state line and rebuying therefrom to interstate destinations:

<i>From</i>	<i>To</i>	<i>Per Mile</i>	
Nashville, Tenn.	Hickman, Ky.	2.2e (Interstate)	.378
Nashville, Tenn.	Woodland Mills, Tenn.	1.65e (Intrastate)	.265
Woodland Mills, Tenn.	Hickman, Ky.	2.2e (Interstate)	.26
	Interstate fare reduced		.87
Nashville, Tenn.	Jackson, Miss.	2.2e (Interstate)	19.06
Nashville, Tenn.	Memphis, Tenn.	1.65e (Intrastate)	4.00
Memphis, Tenn.	Jackson, Miss.	2.2e (Interstate)	4.68
	Interstate fare reduced.		1.38
Chattanooga, Tenn.	Asheville, N. C.	2.2e (Interstate)	5.32
Chattanooga, Tenn.	Wolf Creek, Tenn.	1.65e (Intrastate)	3.25
Wolf Creek, Tenn.	Asheville, N. C.	2.2e (Interstate)	1.06
	Interstate fare reduced		1.01

Johnson City, Tenn.	Dalton, Ga.	2.2c (Interstate)	5.02	
Johnson City, Tenn.	Chattanooga, Tenn.	1.65c (Intrastate)	3.65	
Chattanooga, Tenn.	Dalton, Ga.	2.2c (Interstate)	.84	
	Interstate fare reduced		.53	
Nashville, Tenn.	Roanoke, Va.	2.2c (Interstate)	11.04	
Nashville, Tenn.	Bristol, Tenn.	1.65c (Intrastate)	5.85	
Bristol, Tenn.	Roanoke, Va.	2.2c (Interstate)	3.36	
	Interstate fare reduced		1.83	
Johnson City, Tenn.		Via		
Johnson City, Tenn.	Franklin, Ky.	So. Ry.	2.2c (Interstate)	8.32
Mitchellville, Tenn.	Mitchellville, Tenn.	TC L&N	1.65c (Intrastate)	6.45
	Franklin, Ky.		2.2c (Interstate)	.14
			1.73	

(Gaffney, R. 74; Exhibit 2, R. 333.)

It is common knowledge advantage has been taken by interstate passengers buying tickets at the lower intrastate fares to some points and rebuying from such points, or paying cash fares on trains to destination. The condition which permits this does exist but it is difficult to police. (Gaffney, R. 76.)

With the present differences between the intrastate and the interstate fares, it is possible to defeat the published interstate fares to and from points in Tennessee by purchasing an interstate ticket for a part of the trip.

For example, Item 7 of Exhibit 7 shows that the published interstate one-way coach fare from Johnson City to Birmingham is \$7.89. It is possible to purchase a one-way coach ticket from Johnson City, Tenn., to Chattanooga, Tenn., at the intrastate fare of \$3.65 on basis of 1.65 cents per mile, and repurchase or pay cash fare in the train from Chattanooga to Birmingham at the interstate fare of \$3.19 on basis of 2.2 cents per mile, or a total expenditure of \$6.84, thus defeating the through published interstate fare by \$1.05. Other similar examples are shown in Exhibit 7. These examples could be multiplied many times. (Aiken, R. 198, 199; Exhibit 7, R. 359.)

There is a disposition on the part of travelers to avail themselves of the opportunity of defeating the through rate by buying and rebuying (Aiken, R. 203, 204).

**FINDINGS, 258 I. C. C., 147 (R. 26):**

*An increase in the intrastate fares to the interstate level under existing conditions will not result in any important loss of traffic to other forms of transportation and will produce increased revenue substantially equivalent to those estimated by them.*

**SUPPORTING EVIDENCE—TENNESSEE:**

The increase in fare sought by respondents would produce the increased revenues named in Exhibit 6. The increase would not divert passenger travel to other means of transportation. (Gaffney, R. 193; Aiken, R. 227.)

**FINDINGS, 258 I. C. C., 147 (R. 25):**

*Additional revenue per annum respondents would have received if 2.2 cents were in effect intrastate:*

Alabama .....	\$750,000
Kentucky .....	526,000
North Carolina .....	558,000
Tennessee .....	556,000

**SUPPORTING EVIDENCE—ALABAMA:**

Increased fares in Alabama were published to become effective December 1, 1942. Because of the failure of the Alabama Commission to permit the fare of 2.2 cents per mile to become effective, for the four-month period ended with March 31, 1943, the loss of revenue to the carriers operating in Alabama is \$250,166. On a yearly basis, the loss would amount to \$750,498. (Tassin, R. 708; Exhibit 17, sheet 4, R. 868.)

**SUPPORTING EVIDENCE—KENTUCKY:**

The revenue that would have accrued to the respondents in the State of Kentucky had the passenger business within the state moved on the same fares as interstate would for the seven months ended June 30, 1943, aggregate \$306,951; rated to a year's basis it would be \$526,200 (Tassin, R. 1200; Exhibit 6, R. 1284).

The lines operating in Kentucky are in need of additional revenue. Should be no alarm because railroads had an income and not a deficit in 1942. The cumulative deficits 1936 to 1941 were \$136,387,862, and it would be necessary to have a dozen years like 1942 to equalize that. (Tassin, R. 1202; Exhibit 6, p. 4, R. 1284.)

**SUPPORTING EVIDENCE—TENNESSEE:**

Statement 1 of Exhibit 6 shows the actual revenue loss sustained by the Tennessee railroads, individually and collectively, by reason of the Tennessee Commission's action in suspending the revised intrastate fares and ordering their cancellation.

The actual revenue loss for the twelve-month period from October 1, 1942 (the date upon which the revised interstate fares (became effective), to September 30, 1943, was \$556,280. During the ten-month period from December 1, 1942 (the proposed effective date of the intrastate tariffs), to September 30, 1943, this loss has amounted to \$452,915. For the N. C. & St. L. Ry. the revenue loss for a twelve-month period was \$240,215; for Southern Ry. \$183,925; and for the L. & N. R. R. \$115,718. Such losses are continuing. (Tassin, R. 122; Exhibit 6, R. 339, 341.)

### APPENDIX NO. 3.

The following "thirteenth-section" cases involved the standard passenger fares increased under order of I. C. C. dated July 29, 1920, in *Ex Parte 74, Increased Rates, 1920*, 58 I. C. C. 220. Certain states did not approve in some particular for intrastate application. In each instance the lower state fares were ordered increased to the interstate level:

- Rates, Fares, and Chrges of N.Y. C. R. R. Co.,* (November 13, 1920) 59 I. C. C. 290.
- Intrastate Rates Within Illinois,* (November 13, 1920) 59 I. C. C. 350.
- Arkansas Rates and Fares,* (December 6, 1920) 59 I. C. C. 471.
- Minnesota Fares and Charges,* (December 8, 1920) 59 I. C. C. 502.
- Ohio Rates, Fares, and Charges,* (January 10, 1921) 60 I. C. C. 78.
- Montana Rates, and Fares,* (January 11, 1921) 60 I. C. C. 61.
- Indiana Rates, Fares, and Charges,* (January 28, 1921) 60 I. C. C. 337.
- Utah Rates, Fares, and Charges,* (February 12, 1921) 60 I. C. C. 388.
- Intrastate Rates Within the State of Texas,* (February 12, 1921) 60 I. C. C. 421.
- Iowa Passenger Fares and Charges,* (January 11, 1921) 60 I. C. C. 55.
- Michigan Passenger Fares,* (January 28, 1921), 60 I. C. C. 245.
- Nebraska Rates, Fares, and Charges,* (January 27, 1921) 60 I. C. C. 305.
- Nevada Rates, Fares, and Charges,* (March 8, 1921) 60 I. C. C. 623.
- North Dakota Rates, Fares, and Charges,* (May 3, 1921) 61 I. C. C. 504.
- Arizona Rates, Fares, and Charges,* (May 3, 1921) 61 I. C. C. 572.
- Kansas Rates, Fares, and Charges,* (July 6, 1921) 62 I. C. C. 440.

*Surcharge for Sleeping Car Service in Alabama,*  
(June 14, 1921) 62 I. C. C. 153.

*Surcharge in Sleeping or Parlor Cars in Georgia,*  
(July 11, 1922) 69 I. C. C. 623.

*Surcharge for Sleeping or Parlor Cars in N. C.,*  
(October 6, 1925) 102 I. C. C. 537.

*Alabama Passenger Fares and Charges,* (April 14,  
1924) 88 I. C. C. 621.

The following "thirteenth-section" cases grew out of I. C. C.'s order date January 21, 1942, in *Ex Parte 148, Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545. State fares were ordered increased to the interstate level.

*Rhode Island Commutation Fares,* (September 8, 1942) 253 I. C. C. 383, involved commutation fares increased 10 per cent.

*Increases in Texas Rates, Fares, and Charges,* (December 18, 1942) 253 I. C. C. 723. Involved first-class passenger fares of 3 cents per mile increased 10 per cent.

*Alabama Intrastate Fares, Kentucky Intrastate Fares, Tennessee Intrastate Fares, and North Carolina Intrastate Fares,* March 2, 1942, 258 I. C. C. 133, ordered increased to interstate level. Now on appeal in Nos. 560 and 574, October Term, 1944.